

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

TALMER BANK AND TRUST,

Plaintiff,

vs.

Case No. 2014-1164-CK

METIN SAGANDA, ISTANBUL, LLC and
MARDINI MARKET, INC.,

Defendants.

OPINION AND ORDER

Plaintiff has filed a motion for summary disposition pursuant to MCR 2.116(C)(10). Defendants have filed a response and request that the motion be denied.

Facts and Procedural History

The instant motion involves Plaintiff's attempt to recover insurance proceeds from a fire loss to real property Talmer holds as collateral securing a \$195,000.00 loan. The property is a party store located at 7649 West Vernor Hwy., Detroit, MI ("Subject Property").

On August 22, 2006, Defendant Metin Saganda ("Saganda") borrowed \$195,000.00 from Plaintiff, as memorialized by a commercial promissory note ("Note"). *See* Plaintiff's Exhibit A. The Note had a maturity date of August 22, 2011. On September 19, 2011, Plaintiff and Saganda extended the Note's maturity date to August 22, 2013, as is evidenced by a promissory note ("Note 2") (Note and Note 2 collectively as, the "Notes"). *See* Plaintiff's Exhibit B. The Notes were secured by a mortgage encumbering the Subject Property ("Mortgage"), and an assignment of rents ("Assignment"). The Mortgage and Assignment were both recorded on August 31, 2006.

On August 22, 2006, Saganda executed a commercial security agreement wherein he agreed to insure the Subject Property (“Security Agreement”).

Saganda operated a convenience store on the Subject Property known as Mardini Market. On January 5, 2007 Saganda quit claimed his interest in the Subject Property to Defendant Istanbul, LLC (“Istanbul”). Istanbul then leased the Subject Property to Defendant Mardini Market, Inc. (“Mardini”). Saganda is the sole member and shareholder of Istanbul and Mardini Market, Inc.

Mardini and Istanbul both acquired insurance policies from PrimeOne. Plaintiff is listed as the “loss payee” under Mardini’s policy and as “mortgagee” under Istanbul’s policy.

In September 2012 there was a fire at the Subject Property which caused the store to close. PrimeOne adjusted the loss and issued two checks: (1) a check for \$9,000.00 made payable to Plaintiff and Istanbul and (2) a check in the amount of \$11,964.00 made payable to Plaintiff and Defendant Mardini Market, Inc (“Mardini”). Mardini and Istanbul have refused to endorse the checks.

In addition, Saganda has defaulted on his obligations under the Notes. On March 6, 2014, the Subject Property was sold as a foreclosure sale and Plaintiff was the highest bidder.

On March 24, 2014, Plaintiff filed its complaint in this matter asserting claims for: Count I- Breach of Contract, and Count II- Preliminary Injunction.

On May 27, 2014, Saganda filed a Chapter 7 bankruptcy. Plaintiff’s claims stemming from the loan documents against Saganda were included in the bankruptcy. On September 3, 2014 a discharge was entered. There allegedly remains a \$119,171.85 deficiency under the Notes. However, due to Saganda’s discharge the only remaining outstanding issue is which party/parties are entitled to the two checks issued by PrimeOne.

On September 18, 2014, Plaintiff filed its instant motion for summary disposition of the outstanding issues. Defendants have filed a response and request that the motion be denied. Plaintiff and Defendants have also each filed a reply in support of their positions. October 20, 2014, the Court held a hearing and took the matter under advisement.

Standards of Review

A motion under MCR 2.116(C)(10) tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The Court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.*, at 121.

Arguments and Analysis

First, Plaintiff asserts that it has a first priority interest in both checks pursuant to the Security Agreement. The Security Agreement provides, in pertinent part:

6. Insurance. [Saganda] agrees.....All policies shall expressly provide that [Plaintiff] shall be the loss payee, or alternatively, if requested by [Plaintiff], mortgagee. [Plaintiff] is granted a security interest in the proceeds of such insurance and may apply such proceeds as it may receive toward the payment of Obligations, whether or not due, in such order as [Plaintiff] may in its sole discretion determine.[Saganda] agrees that [Plaintiff] is authorized to act as attorney for [Saganda] in obtaining, adjusting, settling, and canceling such insurance and endorsing any drafts or instruments issued or connected with such insurance.

While the Security Agreement provides that Plaintiff shall be the loss payee or mortgagee under any insurance policy, the only parties to the Security Agreement are Plaintiff and Saganda.

In this matter, the two policies at issue were held by Istanbul and Mardini, neither of which are parties to the Security Agreement. Moreover, Plaintiff has failed to present the Court with any authority pursuant to which Mardini and/or Istanbul are/is bound by the terms of the Security Agreement. Consequently, the Court is convinced that Plaintiff's motion must be denied to the extent that it contends that it is entitled to the insurance proceeds pursuant to the Security Agreement.

Plaintiff also contends that it is entitled to the proceeds by operation of the insurance agreements themselves. The Court will address each of the insurance agreements in turn.

1) Mardini Insurance Agreement

The insurance policy held by Mardini ("Mardini Policy") lists Plaintiff as a "loss payee."

The Mardini Policy also provides, in pertinent part:

For Covered Property in which both [Mardini] and a Loss Payee have an insurable interest:

- a. We will pay for covered loss or damage to each Loss Payee in their order of precedence, as interests may appear.

(See Plaintiff's Exhibit J.)

The Mardini policy lists two categories of "Covered Property": (1) contents of the building and (2) "BUS INC & EE." (See Plaintiff's Exhibit H.)

In this case it appears undisputed that the check issued to Mardini and Plaintiff (the "Mardini Check") was issued in connection with Mardini's claim for lost revenue during the months following the fire. (See Defendant's Response, at 3.) The Mardini Policy limits Plaintiff's right to insurance proceeds to funds arising out of Covered Property in which Plaintiff has an insurable interest. In this matter, Plaintiff has failed to demonstrate that it has an insurable interest in the insurance proceeds awarded to compensate for lost revenue. Moreover,

as Plaintiff's interests are limited to their security interest covering the Subject Property the Court is convinced that Plaintiff does not have an insurable interest in the tenant leasing the Subject Property's potential revenue. Accordingly, Plaintiff's motion must be denied to the extent Plaintiff seeks to recover the insurance proceeds tendered pursuant to the Mardini Policy for lost revenue. Further, the Court is satisfied that Defendant is entitled to summary disposition on this issue pursuant to MCR 2.116(I)(2).

(2) Istanbul Insurance Policy

The insurance policy held by Istanbul ("Istanbul Policy") lists Plaintiff as a "mortgagee." The Istanbul Policy also provides, in pertinent part:

2. Mortgageholders

- a. The term mortgageholder includes trustee.
- b. We will pay for covered loss of or damage to the buildings or structures to each mortgageholder shown in the Declarations in their order of precedence, as interests may appear.

(See Plaintiff's Exhibit I.)

The Istanbul Policy lists two categories of "Covered Property": (1) Building and (2) Loss of Rents (See Plaintiff's Exhibit G.)

In this case it appears undisputed that the check issued to Istanbul and Plaintiff (the "Istanbul Check") was issued in connection with Istanbul's claim for loss of rent during the months following the fire. (See Defendant's Response, at 3.) The Istanbul Policy limits Plaintiff's right to insurance proceeds to "covered loss of or damage to the building..." In this matter, the check at issue was tendered to compensate Istanbul for its lost rent, not for damage to the building, which is an entirely separate category of covered property. Accordingly, any funds received in connection with Istanbul's claim for lost rent falls outside the scope of Plaintiff's

rights under the Istanbul Policy. Consequently, Plaintiff's motion must be denied to the extent Plaintiff seeks to recover the insurance proceeds tendered pursuant to the Istanbul Policy for lost rent. Further, the Court is satisfied that Defendant is entitled to summary disposition on this issue pursuant to MCR 2.116(I)(2).

Conclusion

Based upon the reasons set forth above, Plaintiff's motion for summary disposition is DENIED. Further, Defendants are granted summary disposition pursuant to MCR 2.116(I)(2). Specifically, the Court hereby awards Defendant Mardini, Inc. the check issued by PrimeOne to Plaintiff and Defendant Mardini Market Inc. Further, Defendant Istanbul, LLC is hereby awarded the check issued by PrimeOne to Defendant Istanbul, LLC and Plaintiff.

This Opinion and Order resolves the last claim and closes the case. See MCR 2.602(A)(3).

IT IS SO ORDERED.

/s/ John C. Foster
JOHN C. FOSTER, Circuit Judge

Dated: October 27, 2014

JCF/sr

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